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Mariana Hernandez Crespo G.

University of St. Thomas

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FOREWORD

INTRODUCTION TO THE SYMPOSIUM: LEVERAGING ON DISRUPTION: THE POTENTIAL OF DISPUTE SYSTEM DESIGN FOR JUSTICE, ACCOUNTABILITY, AND IMPACT IN OUR GLOBAL ECONOMY

MARIANA HERNANDEZ CRESPO G.*

I. DISRUPTION IN THE GLOBAL ECONOMY: THE NEED TO CONNECT TO THRIVE

Disruption is the new normal. With an increasingly interconnected world—where volatility in social, political, and economic environments can have a significant influence on the global economy—the future has become more complex and unpredictable.¹ This rise in interconnected and volatile environments has had a profound effect on national and local economies, and the U.S. is experiencing the consequences of globalization in numerous areas, including the legal field.²

* Associate Professor of Law, Deputy to the Dean for International Legal Studies, and Executive Director of the University of St. Thomas International ADR Research Network, University of St. Thomas School of Law, Minneapolis, MN; J.D. and LL.M Harvard Law School; Law Degree, Universidad Catolica Andres Bello, Caracas, Venezuela.

1. See Richard Dobbs, James Manyika & Jonathan Woetzel, *The Four Global Forces Breaking All the Trends*, MCKINSEY & Co. (Apr. 2015), <http://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/the-four-global-forces-breaking-all-the-trends> (describing, in an excerpt from the book *No Ordinary Disruption*, the trends rapidly forming the global economy: urbanization, accelerated technology change, challenges of an aging population, and an interconnected world with flows of capital, people, information, and increased trade).

2. On March 6, 2014 there was a conference at Harvard Law School, organized by Harvard Law School's Program on the Legal Profession titled "Disruptive Innovation in the Market for Legal Services." For videos of presentations from the conference, see Video: Conference Examines 'Disruptions' in Law and Marketplace (Harvard Law Today Mar. 19, 2014), <http://today.law.harvard.edu/conference-examines-disruptions-law-marketplace-video/>; see also Lisa Marrone, *Conference Preview: Disruptive Innovation in the Market for Legal Services*, HARV. L. REC. (Mar. 6, 2014), <http://hlrecord.org/2014/03/conference-preview-disruptive-innovation-in-the-market-for-legal-services/> (giving a preview of the event in which the author quotes the director of Harvard Law School's Program on the Legal Profession, David Wilkins, who explains that there are three trends in the global economy that are affecting legal services: "The first is globalization. The second is the rise in information technology and the speed and ability with which one

For this reason, we are moving into uncharted territory. In this new reality, where uncertainty prevails and the old guidelines have very little use, it is not easy to prepare for global collaboration and competition.³ Yet it is no longer an option to remain local and disconnected, as the rest of the world would continue to move forward without us.

During this time of unprecedented change, we can choose to survive or thrive. While adapting will allow us to get by in the new global economy, more is needed in order to excel. Those who are able to connect, take calculated risks, and innovate together will be positioned to lead and take advantage of the new opportunities this interconnected world provides—specifically, the ability to scale up and advance the common good.⁴

Global connections provide the necessary leverage to lead. In our global economy, those who are connected have a competitive advantage in the social, political, and economic realms. By reaching out to those who share or potentially share our positions, interests, or values, we can strategically position ourselves to become a catalyst for global impact.⁵

II. CONNECTIONS, SHARED DECISION-MAKING, AND CONFLICT: TENSIONS WITHIN AND ACROSS GROUPS

In order to connect effectively, we need to learn to manage conflict and resolve disputes with those around us. It starts with those in our immediate surroundings. Learning to manage conflict and resolve disputes with those in close proximity can nurture the capacities needed to successfully interact with those less familiar to us—a relationship with a more challenging dynamic.

Because we are all unique individuals, no group is completely homogeneous.⁶ It is impossible to always share the same position, interest, or values with those around us. Thus, the question is not whether there will be conflict among the different stakeholders in a group; it is, when there is conflict, how will it be resolved?⁷

Conflict is an intrinsic part of life, regardless of the role we play.⁸ It does not matter if we act as family members, neighbors, community activists, public officials, CEOs, union leaders, members of the clergy, law

can process increasingly large amounts of data. The third is the blurring of traditional categories of work. The legal services industry, which traditionally has been local, low-tech, and insulated, is being affected by all three trends all at once.”).

3. See Dobbs, Manyika & Woetzel, *supra* note 1.

4. See *id.*

5. See *id.*

6. See generally, RONALD HEIFETZ, *LEADERSHIP WITHOUT EASY ANSWERS* (1994).

7. *Id.* at 4 (defining conflict: “In the organizational context, conflict is an expression of dissatisfaction or disagreement with an interaction, process, product, or service.”).

8. CATHY A. COSTANTINO & CHRISTINA SICKLES MERCHANT, *DESIGNING CONFLICT MANAGEMENT SYSTEMS* xiii (1996) (“Conflict is like water too much causes damage to people and property, too little creates a dry, barren landscape devoid of life and color.”).

professors, police officers, foreign director investors, or any other capacities. At some point, we all encounter conflict and have to live with the consequences of how we decided to handle it—a decision that will impact not just our own lives, but also the lives of everyone affected.

While conflict is inevitable,⁹ there are ways to avoid addressing it. The most obvious of these is to live in isolation. However, if we decide to share our lives with others, we can still avoid conflict by either imposing our own will on those around us, or by conforming to their wills.

Disputes can arise when we have to share decision-making power with others—in other words, when we decide to participate in a collective enterprise.¹⁰ Then, we experience different levels of decision-making power. These levels range from just informing or consulting to negotiating. When we inform or are informed, there is a solo decision-maker. When we consult or are consulted, we give or are given only voice. It is when we engage each other in negotiating that we fully share the decision-making power.¹¹

How we handle this decision-making power will directly impact not only the quality of our relationships, but also the capacity to achieve individual and collective goals. Moreover, since every group, as a small system, operates within the context of a larger system, it affects and is affected by the system as a whole.¹² How conflicts are addressed and disputes resolved will thus impact not only the members, but also the groups and the entire system, thereby either undermining or enhancing the common good.

III. DISPUTE SYSTEM DESIGN: AN EFFECTIVE WAY TO MANAGE CONFLICT AND RESOLVE DISPUTES WITHIN GROUPS AND IN THE BROADER SYSTEM

Dispute System Design (DSD) has been defined as “the applied art and science of designing the means to prevent, manage, learn from, and resolve streams of dispute or conflict.”¹³ This field can assist individuals, organizations, neighborhoods, countries, and even the international community in deciding the most effective way to manage their conflicts and resolve their disputes.

Even groups that are unaware of DSD have a system in place for resolving disputes. However, the default might be a system that is power-based, where those who have more power usually prevail. In some cases,

9. *Id.*

10. *Id.* at 5 (distinguishing disputes from conflict: “The conflict is the process and state of dissatisfaction; the dispute is the product of the unresolved conflict”).

11. ROGER FISHER & DANIEL SHAPIRO, *BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE* 87–89 (2005).

12. Lisa Blomgren Amsler, Janet K. Martinez & Stephanie E. Smith, *Christina Merchant and the State of Dispute System Design*, 33 *CONFLICT RESOL. Q.* S7, S9 (applying Eleanor Ostrom’s concept that structures are nested to dispute system design).

13. LISA BLOMGREN AMSLER, JANET K. MARTINEZ & STEPHANIE E. SMITH, *DISPUTE SYSTEM DESIGN* (forthcoming) (draft on file with the author).

groups might also employ rules-based systems to resolve their disputes. Yet, in those cases, conflict can only be adjudicated based on rights, with a single prevailing party. In addition, some groups can employ interest-based systems. This might be a useful option to consider when designing a system, though this may require some expertise in the area of Dispute Resolution.¹⁴ These are all areas in which DSD can help.

The process of DSD, usually led by experts internal or external to the group, addresses the different types of conflicts and disputes between stakeholders—who may have competing positions, interests, or values. These experts engage the stakeholders in a participatory process that first assesses the way tensions have been addressed. Then, experts assist the stakeholders in defining the goals of the system, and craft procedures tailored to meet these goals. Finally, after the new system is implemented, it needs to be regularly evaluated and enhanced.¹⁵

DSD, as a field of knowledge, evolved from Dispute Resolution approximately thirty years ago. Since then, experts have explored frameworks for analyzing and designing systems. They also have confronted the particular challenges of managing conflicts and addressing disputes arising from different stakeholders in different contexts and cultures.¹⁶

The first attempt to create a “common language or frame of reference” to be able to learn from experiences of experts in different fields was a symposium held at Northwestern University in April of 1989, titled “Practitioners of a New Profession?”. Some of the issues they examined included the relevance of culture in DSD, the “roots of a dispute,” and the challenges that new systems face in gaining legitimacy and referrals.¹⁷ It is interesting to note that the topics of discussion, rather than losing relevance, are not only still neuralgic to the field, but have gained even greater significance today.

Among the latest developments in the academic field, there have been two recent symposia: one held at the Ohio State University Moritz College of Law in 2008, and the second at Harvard Law School later the same year.¹⁸ In addition, there have been two major textbooks written to teach DSD: one co-authored by Nancy Rogers, Robert Bordone, Frank Sander,

14. WILLIAM L. URY, JEANNE M. BRETT & STEPHEN B. GOLDBERG, GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT 3–19 (1988).

15. COSTANTINO & MERCHANT, *supra* note 8; NANCY H. ROGERS, ROBERT C. BORDONE, FRANK E.A. SANDER & CRAIG A. McEWEN, DESIGNING SYSTEMS AND PROCESSES FOR MANAGING DISPUTES (2013); AMSLER, MARTINEZ & SMITH, *supra* note 13.

16. For a thorough summary of the evolution of dispute resolution and DSD, see Amsler, Martinez & Smith, *supra* note 12.

17. Tony L. Simons, *Practitioners of a New Profession? A Discussion Summary of the first Dispute Systems Design Conference*, 5 NEGOT. J. 401 (1989).

18. Symposium, *The Second Generation of Dispute Systems Design: Reoccurring Problems, and Potential Solutions*, 21 OHIO ST. J. DISP. RESOL. 1 (2008); Symposium, *Dispute Systems Design Across Contexts and Continents*, 14 HARV. NEGOT. L. REV. 1 (2008).

and Craig McEwen by Aspen Publishers, and one co-authored by Lisa Blomgren Amsler, Janet Martinez, and Stephanie Smith, publication forthcoming by Stanford Press.¹⁹

IV. PUSHING THE FIELD OF DSD FORWARD: EXPLORING OPTIONS FOR INCREASING JUSTICE, ACCOUNTABILITY, AND IMPACT

Despite these significant developments, the field is still in its infancy.²⁰ Practitioners and experts in the U.S. and around the globe contribute every day to the growth of DSD through their experiences, research, and writing. Yet, it is important for those working in the field to have opportunities to gather and engage each other in sharing ideas. The University of St. Thomas School of Law was excited to bring together some of the nation's leading experts in the Fall 2015 symposium, titled: "Dispute System Design: Justice, Accountability, and Impact." In this symposium, the experts explored current challenges and discussed possibilities, given the opportunities of our time.

A. *Different Ways to Read this Volume: Context, Scale, and Direction of the DSD Field*

This volume contains articles written by experts and aims at providing a variety of perspectives on how DSD can be used. The contributions demonstrate how DSD is moving to broader scales, with examples of issues arising in: corporations, communities (Ferguson), states (California), nations (conflict in Northern Ireland), the global environment (investor-State disputes), and even virtual reality.

Similarly, in this volume, you will also find a variety of areas in which DSD can have a significant impact addressing issues in areas such as: sex abuse, end of life care, water shortages, consumers, and labor.

For those of you who have never encountered the DSD field before, this volume will give you a broad sample of how the area is developing. It will provide examples of where DSD can be utilized, how it can have a significant impact, and how it can improve the different systems in which you are immersed and operate on a daily basis.

On the other hand, for those who are already working on and have expertise in DSD, this volume shares how some leading scholars are challenging the field and their latest innovative ideas. These developments can illuminate where DSD is heading. This symposium is intended to further our collective efforts in broadening the reach of the dispute resolution field.

At first glance, the material may seem to present a clash of DSD experiences in different fields, contexts, and on different topics, and it could

19. ROGERS, BORDONE, SANDER & McEWEN, *supra* note 15; AMSLER, MARTINEZ & SMITH, *supra* note 13.

20. Amsler, Martinez & Smith, *supra* note 12.

be read that way. However, at a closer look, it is possible to see the concerns that experts are wrestling with and the ways in which they are harnessing DSD's untapped potential to push the field into new frontiers. The next section presents one way of weaving the contributions together in a short overview of the full contents of this volume.

B. Challenging Current Systems and Stakeholders' Roles: Pushing DSD into New Frontiers

Using Elinor Ostrom's Institutional Analysis and Development (IAD) framework to assist in conceptualizing the larger systems in which smaller systems operate (are "nested"), our Keynote Speaker, Lisa Blomgren Amsler, stresses the need for the dispute resolvers, not just the designers, to analyze the systems in which they operate. Addressing DSD along the policy continuum, from upstream (policy-making), to midstream (implementation), to downstream (enforcement), Professor Amsler ties together the contributions of all of the experts participating in the symposium in her article, *The Dispute Resolver's Role within a Dispute System Design: Justice, Accountability, and Impact*.

Her goal is to inspire academics, experts, and policy-makers in their efforts to design systems that are just, accountable, and have an impact that advances the common good. To this end, she also suggests using the analytical framework for DSD in different contexts. By exploring: (1) the goal, (2) stakeholders, (3) context and culture, (4) processes and structure, (5) resources and success, (6) accountability and learning,²¹ negotiators and dispute resolvers can play an active role in assessing and transforming the systems of which they are a part.

Professor Amsler also proposes that both designers and dispute resolvers should consider the multiple types of justice when conducting their analysis.²² With regard to accountability, she then suggests that negotiators and dispute resolvers have a duty with regard to the role they play. It is not only about resolving an individual case, but rather, accountability refers to the responsibility that all of the members share for the impact of their actions or inactions in the system as a whole. To contextualize this, she uses the example of the sex abuse scandal in the Catholic Church and the lack of accountability of the stakeholders, including the lawyers. This is a powerful example, especially given the severe consequences. Thereby, she argues that responsibility cannot be exclusive to experts and designers.

In the context of sports, Professor Maureen Weston also explores the issue of sex abuse in her article, *Tackling Abuse in Sport through Dispute System Design*. She addresses the concern voiced by the United States

21. *Id.*

22. Lisa Blomgren Bingham, *Designing Justice: Legal Institutions and Other Systems for Managing Conflict*, 24 OHIO ST. J. DISP. RESOL. 1 (2008).

Olympic Committee and the U.S. Center for Safe Sport. To this end, she suggests that it is necessary to define unacceptable conduct and examine what is working and what can be improved with the current systems. Moreover, she offers a rubric for DSD to facilitate addressing and preventing abuse in sport.

In the arbitration context, Professor Nancy Welsh discusses the concerns with mandatory pre-dispute consumer arbitration clauses that are imposed on consumers. In her article, *Class Action-Barring Mandatory Pre-Dispute Consumer Arbitration Clauses: An Example of (and Opportunity for) Dispute System Design?* she explores the issue and questions the role dispute resolution experts and organizations could play.

Focusing on experts, Professor Timothy Hedeon, in his article, *Ombuds as Nomads? The Intersections of Dispute System Design and Identity*, explores the tensions present in the ombuds' role. Specifically, he looks at the issues faced by organizational ombuds with regards to the loyalty they owe to the organization and to those within the organization requesting assistance.

Also challenging roles, Professor Jennifer Reynolds addresses the need to expand the role of activists in her article, *The Activist Plus: Dispute Systems Design and Social Activism*. She articulates the needs for those organizing and mobilizing to not only confront the system, but to also play a role as designers.

Addressing Professor Amsler's challenge for lawyers to play a more active role in the dispute resolution systems in which they participate, Professor Andrea Schneider suggests the use of current community conflicts as educational tools in law schools. In her article, *How Does DSD Help Us Teach Community Conflict (and How Can Community Conflict Help Illustrate DSD)?*, she suggests that the incidence between police and minorities can be used to analyze the pre-existing and then resulting systems. Moreover, she suggests that law students could role play from the perspective of the different stakeholders and conceptualize new options.

Questioning the reasons why DSD has not been adopted more broadly in the corporate world, Professor John Lande explores the issue in his article, *Why and How Businesses Use Planned Early Dispute Resolution*. He suggests that what he calls "planned early dispute resolution" (PEDR) could have been widely adopted, but he argues that some companies are trapped in what he calls a "prison of fear." He explores why some corporate leaders have embraced PEDR.

Turning to investor-States disputes, Professor Susan Franck addressed the attempts to implement DSD in this area. In her talk at the symposium, "Sisyphus, Dispute Systems Design, and International Investment Law,"

Professor Franck addressed some of the significant challenges to incorporate DSD in this context.²³

Using water management on a state level as an example, Professor Janet Martinez illustrates how DSD could be incorporated into the policy spectrum. She shows ways to expand the focus from mainly downstream enforcement (judicial and quasi-judicial ADR) to also incorporating DSD into the upstream (policy-making) and midstream (implementation) in her article *Upstream, Midstream, and Downstream: Dispute System Design for Sustainable Groundwater Management*. She focuses on collective learning among decision-makers, adequate technical data availability, and dispute resolution procedures.

Also addressing at the potential for DSD in non-union organizations, Professor Rafael Gely looks at collective bargaining in his article, *Collective Bargaining and Dispute System Design*. He proposes that, at a time when unionism is declining, the collective bargaining system is significantly more encompassing than the grievance procedure. He suggests that the concepts of negotiation and grievance arbitration can be expanded in order to see how the collective bargaining writ includes a number of dispute resolution processes.

Addressing conflict at a national level, Professor Jacqueline Nolan-Haley discusses the use of DSD to promote justice. In her article, *Designing Systems for Achieving Justice after a Peace Agreement: Northern Ireland's Struggle with the Past*, she focuses on how to design systems that resolve disputes among groups who have a history of conflict and addresses the fundamental question of how to remember the legacy of the past.

Also focusing on relationships but looking more towards the future, Professor Jacqueline Font-Guzmán suggests the use of DSD on a community level. In her article, *Closing the Gap: Embedding Advance Care Planning in a Latino Community by Using a Culturally Sensitive Dispute System Design Approach*, she suggests that Latinos in the U.S. rarely use advanced care planning when compared to Caucasians, and this has a negative impact on the patients, families, and the system. She argues that DSD can contribute to reduce this disparity.

In order to enhance understanding and promote innovation, I gave a talk titled: "Enough of My Way or the Highway: Dispute System Design as a Catalyst to Move from Assimilation to Integration." Examining the issue of culture, I suggest that, in a globalized economy, where countries are competing to attract foreign investors, Cultural Sensibility Frameworks (CSF) in DSD, which, in the foreign direct investment context, I have called Shared Decision System Design (SDSD), could play a critical role in promoting integration, rather than assimilation. This can strengthen the rela-

23. Professor Susan Franck analyzed her previous contributions in the field.

tionship between the host State and the foreign investor, making a difference in investment attraction and retention.²⁴

Turning to the field of Online Dispute Resolution (ODR), Colin Rule, who designed the eBay dispute resolution system, in his article, *Designing a Global Online Dispute Resolution System: Lessons Learned from eBay*, suggests that global transactions require cutting-edge dispute resolution systems that are both simple and expedited. He also addresses the potential challenges and ethical dilemmas with this use of technology.

V. DSD AND THE RISK AND OPPORTUNITIES OF DISRUPTION: ENHANCING YOUR ROLE IN YOUR SYSTEMS

DSD can be a powerful tool for analysis, reform, and reconceptualization of old systems. It provides the lenses to challenge the current systems and the roles stakeholders and experts are playing. Furthermore, its participatory framework allows the old systems to be transformed through inclusive procedures.

In the global economy, given the current level of disruption, new ways of interactions are emerging. If systems are not intentionally designed, conflict will be managed and disputes resolved in ways that might not be in the best interests of all. If dispute systems are left to default, they might produce results that are unfair and may have a negative impact on the most vulnerable stakeholders.

Instead, DSD could allow us to take advantage of the unprecedented opportunities in the global economy and managing some of the risks inherent in this new reality. By including the perspectives of the different stakeholders, we could design systems that promote justice, accountability, and impact.

The analytical frameworks provided by DSD can also allow each of us, not just the experts, to engage the systems in which we operate. As members of our families, the workplace, our communities, and our countries, we can play an active role in examining and envisioning new ways of managing our conflicts and resolving the disputes with those around us.

What is at stake is how we interact and contribute to these systems and whether we have a world in which only a few live meaningful lives, or a world where everyone can contribute. The challenge is for each of us, where we are, and at this time. In this context, the dispute resolution field has a role to play in engaging the average citizen, so that, together, we help to advance the common good.

24. This article will be published as Mariana Hernández Crespo G., *Enough of "My Way or the Highway": Shared Decision System Design (SDSD) with Cultural Sensibility Frameworks (CSF) as a Catalyst to Promote Integration in Investor-State Relationships*, (forthcoming).